Supreme Court, U. S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-893

JAMES AND LINDA ROY,

Petitioners,

— *vs.* —

ONONDAGA COUNTY DEPARTMENT OF SOCIAL SERVICES,

Respondent.

On Petition for A Writ of Certiorari to The United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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The Respondent, Onondaga County Department of Social Services, respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the Judgment of the Court of Appeals of the State of New York entered in the above entitled case on September 11, 1979.

QUESTION PRESENTED

Whether the finding of the trial court that the Petitioners' minor child is a neglected child within the meaning of Section 1012(f)(i) of the New York Family Court Act, said finding being grounded on the use by Petitioners of unreasonable and excessive corporal punishment, results in an interference with the right to the free exercise of Petitioners' religion in violation

of the First Amendment of the United States Constitution as applied to the States by the Fourteenth Amendment.

STATEMENT OF FACTS

On April 8, 1978, 14 year-old Shirley Roy ran away from home. While at a friend's house she had contact with a caseworker from the Onondaga County Department of Social Services Children's Protective Division. Shirley expressed her fear to the caseworker that she would be beaten by her father if she were to return home.

On April 17, 1978 Shirley returned home and was taken the next day to the State of Virginia by her parents to live temporarily with a Baptist minister and his family.

On April 25, 1978 Shirley returned home from Virginia at approximately 11:00 a.m. Later that afternoon she was severely spanked by her father with a wooden shingle. This spanking consisted of 12 to 14 blows to Shirley's buttocks and arm.

Children's Protective Division removed Shirley from her home pursuant to a Court Order on April 26, 1978 after a medical examination determined that the spanking had resulted in severe bruising.

Subsequent to the temporary removal, respondent filed a neglect petition against James and Linda Roy pursuant to Article 10 of the New York Family Court Act. That neglect petition was tried in the Onondaga County Family Court during the Summer of 1978 and an Order dated August 23, 1978 held Shirley to be a neglected child within the meaning of Article 10 of the Family Court Act. Petitioners here appealed said decision and its accompanying Dispositional Order to the New York Supreme Court Appellate Division which unanimously affirmed the lower court finding of neglect and found that there was no constitutional issue to be decided in this case. The case was then brought before the New York State Court of Appeals by Motion for Leave to Appeal, which was summarily denied.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Petitioners have not met the jurisdiction requirements of this Court.

Rules 23 and 15 of the Supreme Court Rules require parties seeking review of a Judgment of a State Court to specify in the Petition for Certiorari, the stage in the proceedings in the Court of first instance and in the Appellate Court, at which, and the manner in which, the Federal questions sought to be reviewed were raised. Petitioners have not addressed this jurisdictional requirement in their Petition. Therefore, the petition is defective on its face and it should be denied.

2. There is no Constitutional issue in this case.

A. A Federal question was not raised in the New York State Courts.

It is a long standing rule that the Supreme Court is not vested with jurisdiction unless a Federal question was raised and decided below. *Crowell* v. *Randall*, 35 U.S. 368, 391 (1836); *Cardinale* v. *Louisiana*, 394 U.S. 437, 438 (1968). There are sound policy reasons for such a rule in that review by the State courts will assure an adequate record and provides the States with an opportunity to make a definitive interpretation of their Statutes. *Hill* v. *California*, 401 U.S. 797, 805 (1970). While the issue of whether a Federal question was sufficiently and properly raised in the State court is itself ultimately a Federal question, *Street* v. *New York*, 394 U.S. 576, 581-585 (1969) the State procedure usually determines the method to be used in raising the Federal question. *In re Lamkin*, 355 U.S. 59 (1957); *Ferguson* v. *Georgia*, 365 U.S. 570, 572 at note 1 (1961).

New York Practice provides that a New York Appellate Court will not review any points not raised in the court below. See *Kolmer-Marcus, Inc.* v. *Winer*, 32 A.D.2d 763 (1st Dep't., 1969), aff'd 26 N.Y.2d 795 (1970); also see N.Y.C.P.L.R. § §4017 and 5501.

In the present case the Constitutional issue of religious freedom was never raised by Petitioners until the appeal, and then was raised as an ancillary issue. The sole issue presented to the Court at trial was whether Shirley Roy was a neglected child pursuant to the New York Family Court Act. The Court found after a full adversary hearing, that she was a neglected child. See *Opinion of Judge Morris Schneider* of the Onondaga County Family Court appearing in the Appendix to Petition for Certiorari at A8.

The Fact Finding Hearing was held to determine whether reasonable force was used in the discipline of Shirley Roy. There is no question that the Petitioners are entitled to use reasonable corporal punishment in the discipline of their child. However, when discipline becomes unreasonable in nature, it is grounds for a finding of neglect under Article 10 of the New York Family Court Act.

Section 1012(f)(i) of the Article states:

"(f) "Neglected child" means a child less than eighteen years of age

(i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care

(A) in supplying the child with adequate food, clothing shelter or education in accordance with the provisions of part one of article sixty-five of the education law, or medical, dental, optometrical or surgical care, though financially able to do so or offered financial or other reasonable means to do so; or

(B) in providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or a substantial risk thereof, including the infliction of excessive corporal punishment; or by using a drug or drugs; or by using alcoholic beverages to the extent that he loses self-control of his actions; or by any other acts of a similarly serious nature requiring the aid of the court . . ."

The question of reasonableness was a question to be decided by the fact finder, who heard the testimony and saw the witnesses. The fact finder in this case, Judge Morris Schneider, found that unreasonable and excessive corporal punishment was used, and subsequently that Shirley Roy was a neglected child pursuant to the New York Family Court Act.

The Appellate Courts agreed. The Appellate Division of the New York Supreme Court specifically found that this case presented no constitutional issue and unanimously affirmed the trial court order. Subsequently, the New York Court of Appeals denied the Motion for Leave to Appeal.

B. New York State has a compelling State interest to protect its children.

New York has declared that the purpose of Article 10 of the New York Family Court Act is "to help protect children from injury or mistreatment and to help safeguard their physical, mental and emotional well being . . ." §1011 New York Family Court Art. These are legitimate state interests, well within the State Legislative power to control. See *Stanley* v. *Illinois*, 405 U.S. 645, 652 (1972). The State has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and this includes to some extent matters of conscience and religious conviction. *Prince* v. *Massachusetts*, 321 U.S. 158, 167 (1944).

In this case the trial court found that a child was neglected as the result of unreasonable and excessive corporal punishment. The State has a compelling interest to protect children from just such physical injury.

C. The acts of Petitioners went beyond the scope of the religion guarantee embodied in the First Amendment as applied to the States by the Fourteenth Amendment.

This Court has held that the First Amendment right to free exercise of a citizen's religious belief encompasses both

freedom of belief and freedom to act in accordance with one's religious convictions. *Reynolds* v. *U.S.*, 98 U.S. 145 (1878). In a case cited by Petitioners, *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) the freedom to hold a religious belief was differentiated from the freedom to act on the basis of one's religious convictions in that the freedom to hold a religious belief is absolute, but the freedom to act on the basis of that belief can be limited when the action conflicts with a compelling state interest. *Cantwell, supra* at 303-304.

Freedom to hold a religious belief is not at question in this case. The trial court's finding of neglect did not prohibit the free exercise of Petitioners' religion. What it did do, however, was to hold that Petitioner's *conduct* went beyond what was reasonable under the circumstances.

Petitioners' assertion of rights pursuant to the First and Fourteenth Amendments is not sufficient to protect unreasonable conduct. The freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions. *Braunfeld* v. *Brown*, 366 U.S. 599, 603 (1961). The New York Legislature's goal of protecting the safety of children as expressed in Article 10 of the Family Court Act is a compelling state interest which legitimately limits the rights of parents under the First Amendment. The right to practice religion freely does not include liberty to expose a child to ill health or death. *Jehovah's Witnesses in Washington* v. *King County Hospital*, 390 U.S. 598 (1968) aff'g per curiam 278 F. Supp. 488, reh. den 391 U.S. 961.

3. **The cases relied upon by Petitioners can be distinguished from the present case.**

There is no dispute that Petitioners have a right to instill their religious beliefs into the training of their children. The cases cited in the Petition for Certiorari clearly outline that right, *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972); *Zorach* v. *Clauson*, 343 U.S.

306 (1952). However, the foregoing cases, which speak to the freedom to educate children in a manner in keeping with the family religion cannot be extrapolated to cover child beating. In the fact finding of this case the issue of education was never raised. Cases discussing education are, therefore, irrelevant to the present case.

Other cases cited by Petitioners are related to attacks upon the philosophical beliefs of a citizen's religion. *U.S.* v. *Ballard*, 322 U.S. 78 (1944); *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940). These cases have no bearing on the present case, in that the truth or veracity of the religious beliefs held by Petitioners was never questioned.

In summary, Petitioners have cited no cases to link the First and Fourteenth Amendment rights with the amount of corporal punishment to be used in disciplining a child.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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